

**BEFORE THE
FEDERAL COMMUNICATIONS COMMISSION
WASHINGTON, D.C. 20554**

December 8, 2002

VIA E-MAIL www.fcc.gov/e-file/ecfs

**COMMENTS TO FCC PURSUANT TO NOTICE OF PROPOSED
RULEMAKING ("NPRM") RESPECTING THE TCPA CG DOCKET No. 02-278**

The following changes should be made to the FCC's existing rules implementing the 1991 TCPA (and specifically the rules restricting unsolicited advertisements via facsimile:

Conclusion:

There are very few complaints and comments with fax advertising and, in particular, business to business advertising using a facsimile machine. Unsolicited fax advertising to businesses is a viable means of advertising and should not be disallowed. The TCPA should be refined to address telemarketing and should remove fax broadcasting (entirely or to businesses) from its scope. Alternatively, a do not call list should be promptly implemented.

Background:

The legislative history of the TCPA clearly demonstrates the stark contrast between the situation that existed in 1991 (and before) and the present situation in 2002. The contrast promises only to become sharper in the future. 10+ years has obliterated the foundational reasoning for the TCPA as it relates to fax broadcasting.

The TCPA was enacted to stop a perceived "tidal wave" of fax broadcasts of unsolicited advertisements. For technological, marketing and other reasons, the tidal wave never developed. Definitive information was never developed to determine the existence, nature and extent of a fax advertising problem. The number of complaints and lawsuits indicate very few people take exception to broadcast faxing. Additional and current information is required to identify the existence of a problem with unsolicited fax advertising and the corresponding need for the government to regulate it. A distinction also needs to be made between contacting businesses and residences.

The TCPA has survived numerous challenges on constitutional and other grounds. The government's interest in passing the TCPA was substantial and the TCPA directly advanced the government's interest asserted. However, assuming a need still exists to regulate unsolicited fax advertisements, due to time and technological advances, the strict liability remedy is no longer the least restrictive remedy readily available. The TCPA's

burden on First Amendment commercial speech (delivered by means of a fax broadcast) is more extensive than is necessary to serve the government's interest. For this reason, the TCPA is an unconstitutional restriction on free speech.

Comments:

1. **STRICT LIABILITY** - The strict liability private cause of action in Small Claims Court of \$500.00 per unsolicited fax advertisement (and treble damages where "willful") was intended to be severe. However, it is also unprecedented. Read, Ignore or Sue skips a fundamental step - No Thank You – Please Don't Fax Me Again. There can be no presumption an unsolicited fax advertisement is unwanted or unlawful. If it is unwanted, the recipient may notify the sender by fax or an 800 # that he or she does not wish to receive any unsolicited fax advertisements in the future. This is a simple and readily available solution.
2. **FAX BROADCASTERS** - With respect to the TCPA restrictions on unsolicited fax advertisements, it is not clear enough on who is liable for an unsolicited fax advertisement. A clear distinction needs to be maintained between the advertiser and the service provider. Although the FCC has ruled the "advertiser" is liable and, except in specific cases, the service provider, carrier and/or fax broadcaster is not liable, the service provider is often sued along with the advertiser. Maintenance of lists is not indicative of anything specific. The FCC should rule fax broadcasters are not advertisers and are not liable under the TCPA. If a fax broadcaster is to be held liable if it "has a high degree of involvement" then naturally this phrase needs to be clearly defined.
3. **JUSTIFICATIONS** - The shifting of cost, burdens, distraction and other inconveniences that were advanced to regulate fax broadcasting were dubious in 1991 and clearly not applicable today.
4. **NO CALL OR NO FAX LISTS** - No call or No fax lists for residences are a simple and readily available solution. State laws, including Colorado and New York, have such laws. These do not call or fax lists are not company specific. Everyone has access to it. These laws enable the consumer to notify a central registration body of their desire not to be called or faxed. Each consumer is able to make his or her own decision. In Colorado these "lists" have been very effective. State lists should be integrated into a national list and when complete preempt state lists.
5. **NATIONAL DATABASE** - A national do not call or fax database of residential subscribers is technologically feasible at this time. Its creation is imminent. If the opportunity exists to resolve this issue on an individual by individual basis, this is the constitutionally mandated approach. The parameters for establishing, maintaining, complying, etc. already exist and should be duplicated by the FCC. Inconsistencies may be resolved on a case by case basis as they arise. Exemptions and private causes of action are not necessary. If your name is on a

do not call or fax list; do not call or fax to that number. If there is a violation, each state should enforce the law as they do now for no call list violations by telemarketers. The FCC should adopt such a database.

6. LAWSUITS – The TCPA as it applies to fax broadcasting has been abused by plaintiffs’ lawyers. These lawyers have attempted to certify class action lawsuits where no such remedy was provided and otherwise profit from the uncertain language and application of the TCPA at the federal and state level. This uneven application of the law was not intended and creates undue and unnecessary cost and time defending these matters.